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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-557

BILLY JENKINS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF APPELLANT

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INTEREST OF THE AMERICAN LIBRARY ASSOCIATION

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes more than 30,000 libraries, librarians, library trustees and members of the general public who are devoted to the development of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its

affiliation with its constituent state library associations, the American Library Association represents over 29,000 public, university and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The American library is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films and other materials which they desire or require to satisfy their intellectual, emotional, recreational or professional interests.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available books and other materials presenting all points of view concerning the problems, issues, and attitudes of the times. Libraries and librarians have, therefore, historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas, and literary styles bearing the imprimatur of governmental authority or the approval of a prevailing majority of the populace. As a result, the American library has become, in many respects, the Nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

The Georgia Supreme Court decision, to which this brief is addressed, has direct and serious implications for libraries and librarians, not only in Georgia, but throughout the Nation. As such, it is of immediate concern to the American Library Association. By affirming a criminal "obscenity" conviction of a motion picture theatre manager for showing the widely praised movie "Carnal Knowledge," the decision places libraries and librarians in direct fear of criminal prosecution. Without question, most library collections contain numerous works with sexual content equivalent to, if not greater than, that found in "Carnal Knowledge."

Furthermore, as detailed herein, the Georgia Supreme Court's opinion makes clear that its decision was an outgrowth of this Court's June 21, 1973 decisions.* Therefore, in reviewing the Georgia decision, the Court must necessarily reconsider those June 21, 1973 decisions.

The "Carnal Knowledge" ruling demonstrates that those June 21, 1973 decisions have serious potential for the widespread suppression of much constitutionally protected material, particularly through their effect on libraries and librarians. Confronted with the prospects of criminal prosecution, it is beyond question that libraries and librarians will tread a cautious path, erring on the side of caution to omit from their collections all materials which might possibly be attacked as "obscene." Such a "self-censorship" program must necessarily suppress constitutionally protected material, and thereby violate the First Amendment rights of libraries, librarians, publishers, authors, and the society they serve.

This brief is submitted in the hope that it will persuade the Court to reverse the Georgia decision below, and, in the process, to modify or reject the June 21, 1973 decisions. The Association has obtained the written consent of both Appellant and Appellee to the filing of this *amicus curiae* brief.**

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* *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8MM Film*, 413 U. S. 123 (1973); and *United States* v. *Orito*, 413 U. S. 139 (1973).

** True copies of the letters evidencing such consent have been lodged in the Clerk's Office.

ARGUMENT

I. THE CONCEPT OF "OBSCENITY" IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The Georgia Supreme Court's ruling conclusively demonstrates that this Court's attempt to define the permissible standards for the suppression of "obscene" materials is fundamentally and irreconcilably at odds with the First Amendment and the Due Process Clause of the Fourteenth Amendment. All the evils which the "void for vagueness" doctrine was designed to cure are manifest in the June 21, 1973 standards as shown by the Georgia court's application of those standards in the case at bar.

Vague laws are invalid, under the Due Process Clause of the Fourteenth Amendment: if they do not provide the public with fair notice of what is prohibited; if they are subject to arbitrary enforcement and application; or if they infringe on the exercise of protected rights. *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972); *Gooding, Warden* v. *Wilson*, 405 U. S. 518 (1972); *Coates* v. *Cincinnati*, 402 U. S. 611 (1971); *Winter* v. *New York*, 333 U. S. 507 (1948). As stated in *Grayned* v. *City of Rockford, supra*, 408 U. S. at 108-109:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the

> attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms, '. . . Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " [Footnotes omitted]

Statutes which affect the area of First Amendment rights, like the Georgia and other "obscenity" statutes, are, therefore, particularly vulnerable to attack for vagueness, because "the standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U. S. 415, 432 (1963). A strict standard is imposed in the recognition that "the freedoms of expression . . . are vulnerable to greatly damaging but barely visible encroachments." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 65 (1963). A strict standard is particularly apt in the "obscenity" area where the line between the "obscene" and "non-obscene" is admittedly "elusive." *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). *Cf. Miller* v. *California*, 413 U. S. 15, 24 (1973).

Under these standards, it is clear that the Georgia "obscenity" statute enforced in the present case, and other obscenity laws construed in harmony with this Court's June 21, 1973 decisions,* violate fundamental First and Fourteenth Amendment

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* In this brief, the Georgia criminal "obscenity" statute. Ga. Code Ann. §§ 26-2101 *et seq.*, is analyzed broadly with other similar "obscenity" statutes which have been or can be redrafted or authoritatively construed as embodying the definition of "obscenity" and the procedural rulings outlined in the Court's June 21, 1973 decisions. The analysis is so focused because this Court made clear in *Miller* v. *California*, 413 U. S. 15, 24 (1973) that applicable state law could be modified to comply with the holdings contained in those decisions through authoritative construction by state courts. Indeed, in its post-*Miller* denials of *certiorari*, the Court has simply vacated the state or federal judgment involved and remanded "for further consideration in light of" the June 21, 1973 decisions. *Carlson* v. *Minnesota*, 42 U. S. L. W. 3238 (U. S. Oct. 23, 1973); *Trinkler* v. *Alabama*, 42 U. S. L. W. 3239 (U. S. Oct. 23, 1973); *West* v. *Texas*, 42 U. S. L. W. 3240 (U. S. Oct. 23, 1973); *Roth* v. *New Jersey*, 42 U. S. L. W. 3240 (U. S. Oct. 23, 1973); *Harding* v.

rights. This fact becomes particularly self-evident when the impact of the statutes and the June 21, 1973 decisions upon libraries and librarians is considered.*

A. The Concept of "Obscenity" Does Not Provide Fair Notice of What Is Prohibited

In *Miller* v. *California, supra,* 413 U. S. at 27, the Court confidently predicted:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

The concern of the dissenters that the new definition of "obscenity" was as vague as its predecessor was dismissed by the majority with the statement that it was "doleful" to "assume that courts cannot distinguish commerce in ideas, protected by

U. S., 42 U. S. L. W. 3241 (U. S. Oct. 23, 1973); *McCrary* v. *Oklahoma*, 42 U. S. L. W. 3241 (U. S. Oct. 23, 1973); *Nissinoff* v. *California*, 42 U. S. L. W. 3384 (U. S. Jan. 8, 1974); *Sharp* v. *Texas*, 42 U. S. L. W. 3385 (U. S. Jan. 8, 1974). *See also Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 55 (1973). Furthermore, in that the Georgia Supreme Court made clear that it considered its holding in the case at bar to be well within the guidelines presented by the Court in the June 21, 1973 decisions, it is obvious that, if the more restrictive interpretations of the Georgia Supreme Court are held to be invalid, the definition of "obscenity" and the procedural rulings contained in the June 21, 1973 decisions likewise must fall.

* Libraries and librarians are not engaged in the "crass commercial exploitation of sex," *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 63, with which the Court was so obviously preoccupied in its June 21, 1973 decisions. *See also, Id.*, 413 U. S. at 57, 63, 64 and 68, and *Miller* v. *California, supra,* 413 U. S. at 36. Nonetheless, the Georgia statute at issue here, as do most other "obscenity" statutes, clearly applies to libraries and librarians in their distribution of reading and other materials to the public. As demonstrated herein, the impact of these statutes on libraries and librarians, particularly in light of this Court's June 21, 1973 decisions, is substantial, and ominous for the continued free and robust dissemination of ideas.

the First Amendment, from commercial exploitation of obscene materials." *Miller* v. *California, supra,* 413 U. S. at 36.

Yet, the Court is now faced with a criminal conviction for the display in a public theatre of the critically acclaimed movie "Carnal Knowledge." That criminal conviction was obtained and affirmed through the application of all three essential elements of the Court's June 21, 1973 decisions—the *Miller* definition of "obscenity,"* the application by a jury of prevailing local community standards, and the absence of supporting expert testimony. Significantly, the film "Carnal Knowledge" is devoid of any actual "depiction or description of patently offensive 'hard core' sexual conduct," clearly has "serious . . . artistic . . . value," and obviously constitutes "commerce in ideas," rather than "commercial exploitation of sex."

To satisfy the Due Process Clause, a criminal statute must be sufficiently definite, in its description of what is prohibited, so that a person of reasonable intelligence can determine how to conduct himself. As stated in *United States* v. *Harriss,* 347 U. S. 612, 617 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

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* The Georgia Supreme Court made it clear that it considered "Carnal Knowledge" to be "obscene" under the *Miller* test. The Court stated at page 184:

> "This [*Roth-Memoirs* "obscenity"] test has been included in our law (Code Ann. § 26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller* v. *California* . . ." *Jenkins* v. *State,* 199 S. E. 2d 183 (Sup. Ct. Ga. 1973).

Other courts have likewise interpreted the *Miller* formulation as permitting greater suppression of sexually oriented materials. *See, e.g., United States* v. *One Reel of Film,* 481 F. 2d 206, 208-209 (1st Cir. 1973).

It appears self-evident that, if judges on the Supreme Court of Georgia, presumably "persons of ordinary intelligence," cannot apply the Court's *Miller* formulation of "obscenity," so as to distinguish between clearly protected expression such as "Carnal Knowledge" and what is supposedly unprotected, the formulation is too indefinite to satisfy the Due Process Clause. Laymen, such as librarians, against whom an "obscenity" statute operates, simply cannot be expected to have any reasonable idea of "what the State commands or forbids," *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939), if state supreme court justices do not.

1. The Terms Used to Define "Obscenity" Are Themselves Void for Vagueness.

The difficulty of the Georgia Supreme Court is, however, readily understandable. The terms employed in the *Miller* definition of "obscenity" are themselves inherently vague and indefinite. The Court defined "obscenity" as matter which "depict[s] or describe[s] sexual conduct" in a manner "which, taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value." *Miller, supra*, 413 U. S. at 24.

As stated, every library collection includes many works having sexual content. The "sexual revolution" acknowledged in *Miller, supra*, 413 U. S. at 36, has been reflected in current literature and periodicals. The public interest in sexual matters, therefore, makes it logical and necessary for libraries to have such materials. Many of these materials, particularly serious "sex education" books, encompass matter at least as explicit as "Carnal Knowledge." Yet, it is impossible to delineate the unprotected from the protected, under the terms employed by the Court. What appeals to prurient interests, is offensive, or lacks serious value depends upon the viewer or reader. A given work may appeal exclusively to the prurient interests of one person, be offensive to another, and have serious scientific

or artistic value for a third.* Librarians generally have no knowledge as to the specific purpose for which an individual is utilizing a given library work. Indeed, any requirement that librarians make such an inquiry would create a hostile, oppressive environment which itself would "chill" access to constitutionally protected works.

In *Coates* v. *Cincinnati*, 402 U. S. 611 (1971), the Court recently struck down for vagueness a municipal ordinance prohibiting three or more persons from congregating on a street "in a manner *annoying* to persons passing by." The Court held:

> "In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.
>
> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all." 402 U. S. at 614.

The terms employed in the *Miller* formulation are no more precise or well-grounded than the term "annoying" in *Coates*. *See also Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676, 682-683 (1968) ("sexual promiscuity"), and cases cited there.

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* This "subjective" element of the concept of "obscenity" is what clearly distinguishes it from the restrictions on speech imposed by the Federal Securities and Antitrust Laws. Those statutes establish restriction on speech which can be objectively measured, i.e. was there a misrepresentation of facts by an untruth or a material omission, or was there an agreement, either by word or by conduct, in restraint of trade. Consequently, the Court's reliance on those statutory proscriptions on commercial speech to justify its suppression of "obscenity", *see Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 61-62, was misplaced. Moreover, the "obscenity" proscriptions affect far more than commercial distribution, as herein demonstrated. What may be permissible in the commercial arena, is not necessarily so in the pure speech area. *Cf. Smith* v. *California*, 361 U. S. 147, 150-151 (1959).

2. The Court's Procedural Rulings Accentuate the Vagueness of the Concept of "Obscenity."

a. "Obscenity" Can Only Be Decided by the Trier of Fact.

The indefiniteness of the terms used to define "obscenity" is accentuated by the Court's ruling that the question of "obscenity" can only be established by a trier of fact applying the "contemporary community standards" of the "average person" in that community. *Miller, supra,* 413 U. S. at 30. In reality, therefore, a librarian cannot know whether a given work will result in prosecution until a jury or judge renders a verdict. Shockingly, that determination can come for the first time, as it did in the case at bar, in the context of a criminal prosecution for engaging in the distribution.

b. "Expert" Testimony Is Unnecessary to Support an "Obscenity" Conviction.

In reaching its verdict, the trier of fact, in many cases a jury, is instructed that the materials involved "obviously, are the best evidence of what they represent." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 56 (1973). Expert testimony has, therefore, been declared to be largely irrelevant.

> "This ["obscenity"] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence, §§ 556, 559 (3rd Ed. 1940). No such assistance is needed by jurors in obscenity cases; indeed, the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." *Id.*, 413 U. S. at 56, n. 6.

Therefore, a librarian's consultation with experts as to the potential "obscenity" of a work affords no significant protection, because such opinions can be substantially disregarded

by the trier of fact. Most librarians do not consider themselves qualified to determine whether a given work is legally "obscene" within the definition provided in *Miller*. Librarians do not receive any professional training which would qualify them to make such a judgment. Indeed, the librarian's own views as to the "serious literary, artistic, political or scientific value" of a given work are themselves irrelevant.

Consequently, despite a good faith belief in the "non-obscenity" of the material, a criminal prosecution is still possible. It is well-settled that the *scienter* required for a criminal conviction is not knowledge that the material is "obsence," but only knowledge of the general contents of the material. *People* v. *Williamson*, 24 Cal. Rptr. 734, 207 C. A. 2d 839, *cert. denied*, 377 U. S. 994 (1964).

c. Local, Not National, Community Standards Apply.

Lastly, the trier of fact is instructed to apply a local community standard. The librarian can never know in advance what "local community standard" will be applied.* Many libraries serve several communities, including combinations of urban and suburban communities and communities in different states.**

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* Indeed, *amicus* is at a total loss to understand what standard applies when a librarian may be subject to federal criminal prosecution, for example, for sending allegedly "obscene" materials through the mails when making an intra-library loan, or for importing such materials from outside the United States. Does a national standard apply for federal statutes? If so, how is the national standard different from local standards? If local community standards apply, is it the standard at the point of shipment or the point of receipt? If the applicable standard is at the point of receipt, how is the librarian to know what the community standard is of a community with which he or she is not familiar? The Court's decisions in *United States* v. *Orito*, 413 U. S. 139 (1973) and *United States* v. *12 200-Ft. Reels of 8MM Film*, 413 U. S. 123 (1973) do not shed light on these issues.

** A requirement that libraries adjust their conduct so as to satisfy the views of the most sensitive community would clearly be objectionable. *Cf. Butler* v. *Michigan*, 352 U. S. 380 (1957).

Ultimately, a librarian, in permitting the public access to a library collection, must do so at his or her peril. The librarian's good faith belief, based on professional judgment or expert opinion, that the work is not "obsence" can be disregarded by a trier of fact applying indefinite terms and a community standard which cannot reasonably be anticipated in advance.

3. The Concept of "Obscenity" Is Meaningless in the Context of Distribution Through a Library.

Moreover, it is the firm conviction of librarians that the Court's concept of "obscenity" is meaningless when examined in the context of a library distribution. The definition of "obscenity" adopted by the Court in *Miller* is designed for measuring works in the abstract. However, this Court has declared that the "obscene" or "non-obscene" character of a work can be controlled by the mode and manner of its distribution. In *Roth* v. *United States*, 354 U. S. 476, 495 (1957), Chief Justice Warren (concurring) stated:

> "The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

The Court quoted the Chief Justice in *Ginzburg* v. *United States*, 383 U. S. 463 (1966) and stated:

> ". . . [E]vidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." 383 U. S. at 474.
>
> ". . . [I]t is settled that the mode of distribution may be a significant part of the determination of the obscenity of the materials involved." 383 at 474, n. 15.

The Court concluded as a matter of law, that publications, which clearly were not "obscene" on their face, could be considered so if distributed in a manner designed to emphasize the sexually provocative aspects of the works. The Court like-

wise acknowledged that a different result could be achieved in a "controlled," a "neutral environment." *Id.*, 383 U. S. at 472. The obvious implication is that matter, which is arguably "obscene," may, as a matter of law, be rendered "non-obscene" when distributed in a controlled, neutral environment.

The passive, non-commercial distribution which takes place in the library setting creates such a neutral environment. The circumstances of presentation necessarily impede prurient appeal and emphasize serious value. Therefore, materials, declared "obscene" in the context of a commercial distribution, should be, as a matter of law, "non-obscene" when simply sitting on a library shelf. A librarian is, therefore, at a loss to determine in advance what might be "obscene" in the context of a library.

It should be obvious that the concept of "obscenity," adopted by this Court and construed by the Georgia Supreme Court, is too indefinite and meaningless to provide the fair, advance notice of what is criminal, and what is not, mandated by the Due Process Clause of the Fourteenth Amendment.

B. The Concept of Obscenity Is Subject to Arbitrary Enforcement and Application.

The second vice of a vague statute is that it is readily subject to arbitrary and erratic enforcement and application. That the concept of "obscenity" articulated by this Court in its June 21, 1973 decisions is subject to abuse is amply born out by the judgments below.

Billy Jenkins was convicted of showing the movie "Carnal Knowledge," a clearly protected work. As part of his defense, he proffered examples of actual "hard core pornography" then currently being distributed in the community. Apparently, there were no arrests or convictions for the distribution of those materials, which were substantially different in nature and content from "Carnal Knowledge." It is patently clear that people engaged in the distribution of written and other mate-

rials, such as librarians, are at the mercy of the local prosecutor's and judge or jury's conception of what is "obscene."

The concept of "obscenity," established by the Court, therefore, is just as susceptible to abuse as the vagrancy statute in *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972). There the Court unanimously struck down the statute, stating:

> "This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States* v. *Harriss*, 347 U. S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U. S. 88; *Herndon* v. *Lowry*, 301 U. S. 242." 405 U. S. at 162.

In *Miller*, the Court explained that a major factor militating against abuse would be the power of appellate courts to make an independent review of the "obscenity" of the materials involved.

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." *Millller* v. *California, supra*, 413 U. S. at 25.

However, the Georgia Supreme Court decision demonstrates how clearly *inadequate* that protection is. Ultimately, the only appellate protection is a declaration of "non-obscenity" by this Court, a result which is long delayed, if possible at all given the Court's docket.* Of course, it is well-settled that delay itself can impermissibly chill the exercise of First Amendment rights.

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* It should be noted that the Federal judiciary's ability to perform a protective function has been vastly limited by this Court's decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), directing the Federal Courts not to intervene in pending state criminal prosecutions. Indeed, the Federal Courts have demonstrated an inclination to abstain in "obscenity" cases even in situations of non-pending proceedings. *See, e.g., Moore* v. *Younger*, Dkt. No. 72-990-H. P. (C. D. Cal. November 29, 1973) (three-judge panel).

Zwickler v. *Koota*, 389 U. S. 241, 252 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360, 378-379 (1964).

C. The Necessary Effect of the Concept of "Obscenity" Is to Curtail Constitutionally Protected Rights.

The most constitutionally damaging consequence of a vague and overbroad statute is the "chilling effect" which it has upon the exercise of protected rights. *Gooding, Warden* v. *Wilson*, 405 U. S. 518, 521 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 619-620 (1971). That the unfettered right to distribute and receive "non-obscene" materials is constitutionally protected is beyond question. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 65 (1963). Nonetheless, the necessary effect of the Georgia and other similar statutes, construed in light of the June 21, 1973 decisions, is to compel libraries, librarians, and others to suppress the distribution of constitutionally protected materials.*

Libraries and librarians have no economic incentive which would justify the risk of their personal freedom in order to insure the widest, or, indeed, any distribution of a particular work.** Therefore, given the impossibility of predicting what

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* The constitutionality of a statute must, of course, be tested by "the operation and effect of the statute in substance." *Near* v. *Minnesota*, 283 U. S. 697, 713 (1931).

** Philosophically, however, libraries and librarians are dedicated to the public's freedom to read, and to that end they seek to provide access to as broad and varied a spectrum of materials, expressing as many diverse and controversial positions, as their limited budgets permit. The American Library Association's "Library Bill of Rights," therefore, provides, in pertinent part:

> "1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.
>
> 2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be proscribed

will or will not be declared "obscene," librarians are certain to omit all materials from their collections which under any interpretation might possibly be declared "obscene." In view of the Georgia Supreme Court's ruling on "Carnal Knowledge", such a course of action will compel a review and "purge" of substantial portions of existing collections and cautious selection of future materials.*

In any such "purge," librarians are certain to "err on the side of caution." Most materials in a library, of course, are exclusively, or primarily, textual. However, the Court made clear in *Kaplan* v. *California*, 413 U. S. 115 (1973), that such materials are equally outside the purview of the First Amendment, if "obscene." Although it is unlikely that a library would have *Suite 69* in its collections, a library would be faced with the hard decisions of eliminating many materials, such as *Catch-22, Manchild In the Promise Land, Portnoy's Complaint, Everything You Ever Wanted to Know About Sex,** from its collection, in that those materials stand in the same relationship to *Suite 69* as "Carnal Knowledge" does to the movies involved in *Paris Adult Theatre I v. Slaton.*

Therefore, the Court's concept of obscenity necessarily inhibits the right of libraries and librarians to distribute constitutionally protected material. In violating the rights of

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or removed from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."

* The requirement that all works be reviewed for "obscene" content will have a significant impact on library operations and costs. The presence of "obscene" content cannot be determined without the review of the entirety of all works. Librarians do not, in most cases, review their acquisitions prior to purchase. Rather, they purchase on the basis of published reviews and requests from patrons, or through a blanket order system from publishers.

librarians, the statute thereby violates the rights of library patrons to have access to constitutionally protected works. *Cf. Smith* v. *California*, 361 U. S. 147, 154 (1959).

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

It is, therefore, patently obvious, in view of the Georgia Supreme Court decision, that the Court's June 21, 1973 standards for suppressing "obscenity" are void for vagueness, due to their indefiniteness, potential for abuse, and incursions on protected rights.

II. THE GEORGIA CRIMINAL "OBSCENITY" STATUTE CREATES A COMPREHENSIVE SCHEME OF CENSORSHIP WHICH INCLUDES NONE OF THE CONSTITUTIONALLY REQUIRED PROCEDURAL SAFEGUARDS.

By permitting the suppressions of "obscene" materials, the Court's June 21, 1973 decisions sanction state "obscenity" statutes, like Georgia's and others,* which prohibit all forms of distribution, both commercial and non-commercial. These statutes effectively create a comprehensive system of censorship. The system is administered by the private individuals who are engaged in the distribution of written and other materials to the public. These private individuals, such as librarians, are coerced into acting as censors, by the threat of criminal prosecution. As a criminal prosecution can be commenced prior to any judicial determination that the material distributed is "obscene,"** the burden of censorship is placed directly on these private individuals.

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* *See, e.g.*, Cal. Penal Code §§ 311 *et seq.*; *Ill. Rev. Stats.*, S. H. A. ch. 38 §§ 11-20 *et seq.*; *N. Y. Penal Law*, §§ 235.00 *et seq.*

** In the present case, Billy Jenkins was convicted prior to any judicial determination that the movie "Carnal Knowledge" was obscene.

This Court has consistently held that any system of censorship must provide adequate procedural safeguards.* Those holdings are based on the recognition that a censorship decision not to distribute constitutes a total and final prior restraint. As stated in *Freedman* v. *Maryland*, 380 U. S. 51, 57-58 (1965):

> "Because the censor's business is to censor, there inhers the danger that he may well be less responsive than a court —part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final."

The Court, therefore, has declared that censorship schemes must provide prompt notice to those affected, an adversary hearing as to the "obscenity" of the material, prompt judicial review of any such determination, and place the burden of seeking review on the censor. As stated in *Blount* v. *Rizzi*, 400 U. S. 410, 417 (1971):

> ". . . [T]o avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require 'prompt judicial review'—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit the preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judical determination."

The censorship schemes effectuated by the Georgia and other criminal "obscenity" statutes obviously fail to satisfy these procedural requirements. The decision of a librarian to censor the distribution of a given work or film is clearly not reviewable.

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* *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968); *Blount* v. *Rizzi*, 400 U. S. 410 (1971); *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971).

The librarian has no obligation to provide notice of his decision or to seek review of that decision, nor would such obligations be reasonable. The librarian also has no economic incentive to provide notice or to seek review; indeed, there are strong economic disincentives.*

As indicated, the publisher and the author will have no way of knowing that they are victims of censorship. Likewise, the individual who is deprived of access to a book or film cannot seek review of the librarian's decision as, in most instances, the person will be unaware of the reason for the non-availability of the work. Therefore, the private censorship decisions compelled by these statutes can be final in effect, despite the fact that this is a decision which private individuals, such as librarians, are ill-equipped to make.**

The Court has declared other censorship schemes unconstitutional due to their inherently inhibiting effect upon protected speech. In *Smith* v. *California, supra,* the censorship scheme was effectuated by a strict liability statute which prohibited the possession of "obscene" materials. The Court stated there:

> "The bookseller's self-censorship, compelled by the State, would be censorship affecting the whole public, hardly less virulent for being privately administered." 361 U. S. at 154.

Likewise, in *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963), the Court declared a statute unconstitutional, on due process grounds, because it established an unofficial censorship board to monitor materials which could potentially be distri-

* Indeed, librarians are concerned that a decision not to acquire a work on the ground that it is "obscene" could be challenged by an author or publisher in that the determination, at least to the extent made by a public library, may constitute state action in violation of their First Amendment rights. Furthermore, a decision could subject a library or librarian to a suit by the author or publisher for trade libel.

** As stated, most librarians do not consider themselves qualified to determine whether a given work is legally "obscene." They receive no professional training which would so qualify them.

buted to minors. The Court emphasized that it is function, not form, which establishes the need for procedural safeguards. *Id.*, 372 U. S. at 67.

A "State is not free to adopt whatever procedures it pleases for dealing with obscenity . . ." *Marcus* v. *Search Warrant*, 367 U. S. 717, 731 (1961). "Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression . . .'" *Blount* v. *Rizzi, supra*, 400 U. S. at 416 quoting from *Bantam Books, Inc.* v. *Sullivan, supra*, 372 U. S. at 66. The censorship scheme compelled by the Georgia and similar "obscenity" statutes is constitutionally deficient under the Court's own well-established procedural standards. *Blount* v. *Rizzi, supra*. It, therefore, must be declared invalid.

III. NO CRIMINAL PROSECUTION CAN BE PERMITTED UNTIL THERE HAS BEEN A JUDICIAL DETERMINATION IN A CIVIL PROCEEDING THAT THE MATERIAL IS "OBSCENE."

The Court has consistently utilized procedural tools in order to protect against the invasions on protected speech which innately flow from attempts to suppress "obscenity." "Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . ." *Bantam Books, Inc.* v. *Sullivan, supra*, 372 U. S. at 66. The decision of the Georgia Supreme Court must certainly serve to put the Court on notice that procedural safeguards are necessary if incursions on free speech are to be avoided.

Under the Georgia "obscenity" statute, as well as many others, a librarian can be convicted for the distribution of materials which he or she believes in good faith to be constitutionally protected, despite the absence of any prior adversary hearing as to the "obscenity" of the material involved. So long as the

prosecuting officer has obtained the material through simple removal from the library, even a minimal *ex parte* proceeding before a neutral magistrate is unnecessary. *Peachtree News Co.* v. *Slaton*, 226 Ga. 471, 175 S. E. 2d 539 (1970). It is precisely this statutory framework which chills the exercise of First Amendment rights, because, as stated, it places the burden of determining what is or is not "obscene" on the distributor, with the penalty for a wrong guess being imprisonment.

In order to abate the hazards to protected speech presented by the existing vague scheme of mandatory self-censorship, the Court should follow the thrust of its own holdings and declare that no criminal prosecution for the distribution of "obscene" materials can be undertaken until there has been a judicial determination, in an adversary context, with a right of review, that the material is "obscene," and the individual affected has had an opportunity to adjust his conduct.

This Court has already recognized that the most effective procedural tool for protecting First Amendment rights is a judicial determination of the "obscenity" of the materials involved in an adversary proceeding, with a right of prompt review. As stated in *Freedman* v. *Maryland*, *supra*, 380 U. S. at 58:

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

Consequently, in *A Quantity of Books* v. *Kansas*, 378 U. S. 205, 210 (1964), the Court held that a seizure of all copies of a given title could not be authorized without a prior adversary hearing "focus[ed] searchingly on the question of obscenity." The Court reasoned that any other procedure would "not adequately safeguard against the suppression of non-obscene books." *Id.*, 378 U. S. at 208.

The threat of criminal prosecution, without any advance determination of the "obscenity" of the material distributed,

clearly presents as serious a threat to constitutionally protected rights as the seizure of all copies of a work in *Kansas*. Furthermore, as already indicated, by establishing a comprehensive censorship scheme, these criminal "obscenity" statutes effectuate a total, *final restraint* on the distribution of materials. Therefore, it is but a logical extension of the law to hold that a judicial determination in an adversary proceeding must take place prior to the commencement of any criminal prosecution.

Indeed, this Court has repeatedly expressed its preference for statutory schemes which provide a civil hearing prior to any criminal prosecution. As the Court recently stated in *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 55:

> ". . . [S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation."

See also Kingsley Books, Inc. v. *Brown,* 354 U. S. 436, 441-444 (1957); *Freedman* v. *Maryland, supra,* 380 U. S. at 60; and *Blount* v. *Rizzi, supra,* 400 U. S. at 420. The Court should recognize that not only is this scheme the best possible procedure, it is the one that is constitutionally mandated to assure "non-obscene" materials the protection to which they are entitled.

Any argument that such a procedure would too severely hamper the states in their enforcement of the "obscenity" laws must be rejected. As this Court recognized recently in *Roaden* v. *Kentucky,* 413 U. S. 496, 505 (1973), "obscenity" does not present the type of "now or never" criminal situation which requires immediate action without prior judicial evaluation. Furthermore, nothing is to prevent the state from adopting reasonable "time, place, and manner" regulations which may be deemed necessary. *Cox* v. *Louisiana,* 379 U. S. 536, 554-555 (1965).

CONCLUSION

Amicus respectfully submits that the Court should reverse the decision of the Georgia Supreme Court for the reasons set forth above.

Respectfully submitted,

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